IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1054

JEFF TRACHTMAN, individually and by his father GILBERT M. TRACHTMAN,

Petitioners,

—against—

IRVING ANKER, individually and in his capacity as Chancellor of New York City Public Schools, SANFORD GELERNTER, individually and as Administrator of Student Affairs, Office of High Schools, Board of Education of the City of New York, GASPAR FABRICANTE, individually and as Principal of Stuyvesant High School, and JAMES REGAN, ISAIAH ROBINSON, STEPHAN AIELLO, AMELIA ASHE, JOSEPH BARKAN and ROBERT CHRISTEN, constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALAN H. LEVINE
STEPHEN SHAPIRO
RICHARD EMERY
New York Civil Liberties Union
84 Fifth Avenue
New York, N. Y. 10011

MARTIN M. BERGER
BERGER, KRAMER AND SUGARMAN
377 Broadway
New York, N. Y. 10013

Attorneys for Petitioners

INDEX

TABLE OF AUTHORITIES

Cases:

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF

APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, Judge Mansfield, dissenting, entered in the above-entitled case on August 31, 1977.

OPINIONS BELOW

The opinion of the district court is reported at 428 F. Supp. 198 and is set out in the Appendix, infra, pp. 36a to 59a. The opinion of the Court of Appeals is reported at 563 F.2d 512 and is set out in the Appendix, infra, pp. 1a to 15a. The dissenting opinion of Judge Mansfield is set out in the Appendix, infra, pp. 17a to 31a. The decision of the Court of Appeals to deny a rehearing is not officially reported. It is set out in the Appendix, infra, p. 34a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 31, 1977, and petitioners' application for a rehearing

was denied by the Court of Appeals on October 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment protects the right of high school students to distribute, and then publish in their newspaper, the results of a confidential and non-obscene survey canvassing the sexual attitudes of their fellow students.

2. Whether distribution of the survey may be subject to prior restraint because of the speculative fear of school officials that some unusually sensitive or immature students may experience a certain degree of emotional anxiety when exposed to the survey, without any consideration or exploration by school officials of less restrictive alternatives which would adequately protect those students.

STATEMENT OF THE CASE

This civil rights action was begun by Jeff Trachtman, a student at Stuyvesant High School, located in New York City. Petitioner, editor-in-chief of his school newspaper, The Stuyvesant Voice, decided

that it would be both newsworthy and informative to survey the sexual attitudes of the student body at Stuyvesant and then publish the results in an interpretive article. In order to gather the necessary data, the staff of the Voice devised a list of twenty-five questions which they proposed to distribute on a random and confidential basis.1/ The questionnaire was to be accompanied by a cover letter which described the nature of the project, stated that all responses would be anonymous, requested honest replies, and advised the students that they need not answer any question which made them feel uncomfortable.

In accord with what appears to have been a standard requirement for prior review, the survey proposal was submitted in advance to the school principal, Gaspar Fabricante, who refused to allow it. On behalf of the Voice staff, petitioner then exhausted his administrative remedies by seeking reconsideration of the principal's determination from various pertinent officials within the Board of Education. More than two months after the original submission, the principal's decision was upheld by the Board of Education, which explained that "[m]atters dealing with sexuality could have serious consequences for the well being of the individual" and

---

1/ The survey is an appendix to the district court opinion and is contained herein at p. 56a.

that, accordingly, surveys dealing with sexuality could only be conducted by professional researchers.

Shortly thereafter, petitioners initiated this action in federal district court. By agreement of the parties, the issue was decided by the district court on the basis of briefs and affidavits. The 1 1/2 page affidavit of Ingram Cohen, Chief School Psychiatrist of the Bureau of Child Guidance of the Board of Education, is typical of those offered in support of respondents' position. Without citing a single experiment, study, article, book or authority, Dr. Cohen suggested that "a" student might "become anxious or even depressed" when confronted by the questionnaire which he therefore regarded as "potentially harmful." In reply, petitioners' experts pointed out the social, educational and emotional benefits to be gained from an open discussion of sexual attitudes, emphasizing at the same time that teenagers living and travelling in an urban environment are daily bombarded by sexual stimuli far more provocative and dramatic than anything contained in the proposed student survey.

The district court ruled that petitioner could not be restrained from distributing the survey to 11th and 12th graders, but that distribution to 9th and 10th graders could be restrained. The method of distribution was left to be worked out among the parties. As an additional safeguard, however, the

district court directed that "provision... be made for both confidential and public discussion groups for students who would like to talk with school personnel after the distribution of the survey and the publication of the results in the Voice."50a.

On appeal, the Second Circuit reversed by a 2-1 vote that portion of the district court judgment permitting distribution to 11th and 12th graders. The majority concluded that restraint of the survey was "reasonable" and never went on to explore the possibility of less restrictive alternatives. The import of that decision was aptly summarized by Judge Mansfield, who stated in dissent:

> "[R]elying upon dicta in Tinker v. Des Moines School District, 393 U.S. 503, 508, 513 (1969), to the effect that school authorities may prohibit speech 'that intrudes upon... the rights of other students,' or 'involves...an invasion of the rights of others,' [the majority] would include in these amorphous terms the dissemination to others of non-obscene material because it might cause some kind of 'psychological' harm to an undefined number of students. With this I disagree. It represents an entirely too vague and nebulous extension of the concept of 'rights to

support the drastic type of censorship and prior restraint sought by the defendants."
17a.

REASONS FOR GRANTING THE WRIT

In the years since Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), the scope of students' First Amendment rights has been vigorously debated in the lower federal courts. The decision of the court below, however, marks the first time that any Circuit Court has ever upheld a ban on a high school student publication. See Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972); Riseman v. School Committee of Quincy, 439 F.2d 148 (1st Cir. 1971); Fujishima v. Board of Education 460 F.2d 1355 (7th Cir. 1972); Scoville v. Board of Education, 425 F.2d 10 (7th Cir. 1972); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Gambino v. Fairfax County School Board, 429 F. Supp. 731 (E. D. Va.), aff'd, 564 F.2d 157 (4th Cir. 1977); Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975).

The decision also marks a departure in at least three respects from First Amendment holdings of this Court. (1) The Court of Appeals decision imposed a prior restraint on the basis of its "reasonableness". Cf. Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971). (2) It denied First Amendment protection to expression because of the emotional disturbance which it might cause. Cf. Cohen v. California, 403 U.S. 15 (1971); Terminiello v. Chicago, 337 U.S. 1 (1949). (3) It determined whether or not expression was protected on the basis of its feared impact on the most impressionable members of the audience. Cf. Roth v. United States, 354 U.S. 476, 489 (1957); Butler v. Michigan, 352 U.S. 380, 383-84 (1957).

The Second Circuit justified its abandonment of First Amendment principles[2/] on the basis of its reading of Prince v. Massachusetts, 321 U.S. 158 (1944) and Ginsberg v. New York, 390 U.S. 629 (1968). Those cases, the court held, authorized school officials "to protect the physical and psychological well being of students while they are on school grounds..." 8a.

2/ Both the majority opinion, 8a, n.2, and Judge Gurfein's concurrence, 16a, imply that the restraint did not violate the First Amendment because the survey sought to obtain, rather than convey, information. On the other hand, both opinions suggest that a report of the information obtained by the survey could also be prohibited on the same grounds that the survey was prohibited. In any case, the gathering of the information itself enjoys First Amendment protection. Branzburg v. Hayes, 408 U.S. 665 (1972).

Having previously declined in Ginsberg to fully "consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State," id. at 636, the Court should grant certiorari in this case in order to decide whether student expression may be circumscribed when the State asserts that the expression will subject other students to psychological harm.

I.

Students May Not Be Denied Their First Amendment Right to Distribute Literature Because of the Fear That Some Students May Suffer Psychological Harm.

As far as plaintiffs can determine, no decision of this Court or any Circuit Court has upheld a restriction on expression because of the fear that some members of the intended audience would find the message so disturbing or unsettling that they would suffer psychological harm as a result. In fact, such a restriction is seemingly in direct conflict with decisions such as Terminiello and Tinker, both of which recognized that speech is often provocative, unsettling and disturbing. The only difference in this case is that experts have said that the unsettling effect of plaintiffs' speech may cause some students psychological harm. It is fair to assume that the results in Tinker

and Terminiello would have been unaffected by such expert testimony.

If First Amendment rights can be overcome upon the showing made here, the State would have little difficulty, with the aid of some expert testimony, prohibiting activities previously found to enjoy constitutional protection. For example, if, as defendants' experts allege, the subject of homosexuality poses a particular danger to students, the First Amendment right of gay students to associate in officially recognized campus organizations is surely in doubt. See, e.g., Gay Students Organizations of Univ. of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Lib v. University of Missouri, 558 F. 2d 848 (8th Cir. 1977).

Since, according to defendants' experts, adolescents are anxious about the "whole area of sex," 10a, the state could easily justify the suppression of student newspapers with information about birth control. Shanley v. Northeast Independent School District, supra; Bayer v. Kinzler, supra. Moreover, although defendants' experts do not deal with the subject, it is well known that adolescents are also anxious about their relationship to authority. Consequently, the state could surely defend a ban of a student newspaper that ridicules school officials and school

policies. Scoville Board of Education, supra; Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).

In fact, the writings of such noted authorities on adolescents as Erik Erikson and Kenneth Keniston have amply documented the anxiety that adolescents suffer concerning every aspect of their identity. One might well assume, therefore, that expert testimony could be found to justify suppression of any article dealing with subjects such as race, religion, family life, and patriotism. As Judge Mansfield noted, the majority decision would permit the State to prohibit students from reading a broad range of articles that regularly appear in The New York Times. 18a.

II.

The Suppression of Petitioner's Questionnaire Represents An Impermissible And Unconstitutional Prior Restraint.

In order for a system of prior restraints to overcome the "heavy presumption against its constitutional validity", Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), it "first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, it must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." Southeastern Promotions, Ltd. v. Conrad,

420 U.S. 546, 559 (1975). The restraint imposed upon plaintiffs below fails to meet either requirement.

There is no evidence in this case that the prior restraint upheld by the court below falls within any of the exceptions defined by this Court. The school officials' fear that distribution of the survey will cause some vague emotional disturbance in some undetermined number of students may not substitute for the requirement of proof that distribution will "inevitably, directly and immediately," New York Times Co. v. Sullivan, 403 U.S. 713, (1971) (Brennan, J., concurring), cause an event of the most profound seriousness. As Judge Mansfield noted in dissent, "There is no suggestion of any danger that the questionnaire would disrupt school activities or lead to a breach of the peace, which are the type of 'substantive evils' that might justify a prior restraint." 17a. Moreover, the school officials' fears were based on expert affidavits that were wholly speculative and theoretical. Their conclusions were supported by no studies nor by any information about the particular student body that was the target of the survey. Judge Mansfield objected on this ground as well.

> "[A] general undifferentiated fear of emotional disturbance on the part of some student readers strikes me as too nebulous and as posing too dangerous a potential for unjustifiable destruction of constitutionally protected free speech rights to support a prior restraint." 18a.

The procedural requirement for a prior restraint was also not met. The restraint was procedurally deficient in two respects. First, a period of over two months elapsed between plaintiff's initial submission of the material to the school principal and the final decision of the Board of Education denying permission to distribute the questionnaire. This is not the prompt review procedure that is constitutionally mandated. Freedman v. Maryland, 380 U.S. 51 (1965); Baughman v. Freiemuth, supra, (4th Cir. 1975). Indeed, no criteria, precise or imprecise, existed prior to this dispute authorizing school officials to restrain student speech on the basis of psychological harm.

III

If Defendants' Concerns About Psychological Harm To Students Is Legitimate, There Were Less Restrictive Means Available To Satisfy Those Concerns.

Assuming that the school officials' fears concerning the reaction of some students were legitimate, there were means available other than a total prohibition of the survey, that would have protected the students. The district court ordered that school officials provide for "confidential and public discussion groups" for any students wishing to talk about the survey. 13a. Plaintiffs, themselves, proposed a legend on the face of the survey cautioning any students who might feel uncomfortable responding to it. 20a.

Those, and perhaps other, means were available to defendants to satisfy whatever legitimate concerns they had. Well-settled constitutional principles demand that those means be employed. "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a... [means] that broadly stifles the exercise of personal liberties." Kusper v. Pontikes, 414 U.S. 51, 59 (1973). As the Fifth Circuit has aptly observed, this Court in Tinker "declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative." Butts v. Dallas Independent School District, 436 F. 2d 728, 732 (5th Cir. 1971). Defendants failed to avail themselves of existing alternatives.

CONCLUSIONS

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

ALAN H. LEVINE
STEPHEN SHAPIRO
RICHARD EMERY

New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011

MARTIN M. BERGER
Berger, Kramer and
Sugarman
377 Broadway
New York, N.Y. 10013

Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 989-90—September Term, 1976.

(Argued March 31, 1977 Decided August 31, 1977.)

Docket Nos. 77-7011 and 77-7033

JEFF TRACHTMAN, individually and by his father, GILBERT M. TRACHTMAN,

Plaintiffs-Appellants-Appellees,

v.

IRVING ANKER, individually and in his capacity as Chancellor of New York City Public Schools, SANFORD GELERNTER, individually and as Administrator of Student Affairs, Office of Student Affairs, Office of High Schools, Board of Education of the City of New York; GASPAR FABRICANTE, individually and as Principal of Stuyvesant High School, and JAMES REGAN, ISAIAH ROBINSON, STEPHAN AIELLO, AMELIA ASHE, JOSEPH BARKAN, and ROBERT CHRISTEN, constituting THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants-Appellees-Appellants.

Before:

LUMBARD, MANSFIELD, and GURFEIN,

Circuit Judges.

Cross appeals from a judgment of the Southern District, Motley, *Judge,* which declared that defendants could pro-

hibit distribution of a sex questionnaire to ninth and tenth-grade students at Stuyvesant High School but enjoined defendants from restraining distribution to eleventh and twelfth-grade students on First Amendment grounds.

The judgment is reversed insofar as it enjoins defendants from prohibiting distribution of the questionnaire to eleventh and twelfth-grade students, with directions to dismiss the complaint.

MARTIN M. BERGER, Cooperating Attorney—New York Civil Liberties Union (Berger, Kramer & Sugerman, New York, New York, on the brief), *for Plaintiffs-Appellants-Appellees.*

CAROLYN E. DEMAREST, New York, N.Y. (W. Bernard Richland, Corporation Counsel for the City of New York and Leonard Koerner, on the brief), *for Defendants-Appellees-Appellants.*

LUMBARD, *Circuit Judge:*

These are cross appeals from a judgment of the Southern District, Constance Baker Motley, *Judge,* entered on December 16, 1976, which enjoined defendants from restraining plaintiffs' attempts to distribute a sex questionnaire to eleventh and twelfth-grade students at Stuyvesant High School in New York City and to publish the results in the student publication, "The Stuyvesant Voice." Plaintiffs Jeff Trachtman, then a senior student at Stuyvesant and editor-in-chief of the "Voice," [1] and his father, Gilbert M.

---

1 We note that the senior class at Stuyvesant was scheduled to graduate on June 22, 1977 and, thus, Jeff Trachtman may no longer be a member of the student body. However, assuming Trachtman has graduated, we do not think that the case has thereby become moot. See, e.g., *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974). In bringing this suit Trachtman was acting not only as a student but in a representational capacity as editor-in-chief of "The Stuyvesant Voice." Thus, plaintiffs' complaint states that Trachtman is the editor-in-chief of the "Voice" and that the proposed survey was prepared by members of the "Voice" staff in preparation for an article to appear in a March 1976 issue of the "Voice." The record indicates that the questionnaire at issue and the proposed article were approved by the entire editorial board of the "Voice." The complaint requests relief on behalf of "plaintiffs and other [sic] similarly situated" and asks that the defendants be enjoined from prohibiting the publication and interpretation of the results of the questionnaire in the "Voice." Further, Judge Motley specifically noted that in seeking permission to conduct the survey Trachtman was acting "in his capacity as editor-in-chief of . . . the *Voice.*"

Although the complaint did not formally so assert, Trachtman was litigating in a representational capicity. Cf. *Richardson* v. *Ramirez,* 418 U.S. 24, 36-40 (1974). Plaintiffs seek to vindicate not only Trachtman's rights as an individual student, but the right of the "Voice" and its staff to conduct the survey. Accordingly, we think the fact that Trachtman may no longer be a student at Stuyvesant does not moot the case as we have no doubt that there is a proper adversary relationship here to assure proper presentation of the issues (plaintiffs are represented by an attorney affiliated with the New York Civil Liberties Union), see *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 752-57 (1976), and plaintiffs may be considered as acting on behalf of a student association and its members who have a continuing stake in this litigation. Cf. *Hunt* v. *Washington State Apple Advertising Commission,* 45 U.S.L.W. 4746, 4748-49 (U.S. June 20, 1977).

Trachtman, appeal from so much of the court's decision that allows defendants to prohibit distribution of the questionnaire to ninth and tenth-grade students at Stuyvesant. Defendants, Chancellor of the New York City Public Schools and officials of the New York City school system, contend that the district court erred in holding that their prohibition of the distribution of the questionnaire to any students at Stuyvesant violated the First Amendment. We conclude that defendants' actions in prohibiting the proposed sexual survey did not violate any constitutional right of the plaintiffs; accordingly, the order of the district court is reversed insofar as it restrains defendants

from prohibiting distribution of the questionnaire to eleventh and twelfth-grade students at Stuyvesant.

This controversy began when Jeff Trachtman and Robert Marks, a staff member of the "Voice," submitted a plan to survey the sexual attitudes of Stuyvesant students and publish the results in the "Voice" to the school's principal, defendant Fabricante. Initially, the plan contemplated oral interviews of a "cross section" of the student population to be conducted by a group of student researchers. Mr. Fabricante denied the students permission to conduct the survey and, on December 4, 1975, Marks wrote to defendant Gelernter, Administrator of Student Affairs, seeking approval of the project. Gelernter responded by letter, dated December 17, 1975, stating that the proposed survey could not be conducted.

The students sought review of Gelernter's decision by Chancellor Anker. By this time the focus of the proposed survey had shifted from oral interviews to a questionnaire. Thus, in their letter to Anker, dated December 24, 1975, Trachtman and Marks submitted for review a questionnaire consisting of twenty-five questions, which, they advised, was to be used as a means for obtaining information for an article on "Sexuality in Stuyvesant" to appear in the "Voice." The questions, which the district court described as "requiring rather personal and frank information about the student's sexual attitudes, preferences, knowledge and experience," covered such topics as pre-marital sex, contraception, homosexuality, masturbation and the extent of students' "sexual experience." The questionnaire included a proposed cover letter which described the nature and purpose of the survey; it stressed the importance of honest and open answers but advised the student that, "[y]ou are not required to answer any of the questions and if you feel particularly uncomfortable—don't push yourself."

The students sought permission to distribute the questionnaire on school grounds on a random basis. The answers were to be returned anonymously and were to be kept "confidential." The students were to tabulate the results and publish them in an article in the "Voice," which would also attempt to interpret the results.

Having received no reply from Chancellor Anker, on January 13, 1976 Marks and Trachtman wrote to Harold Siegel, Secretary of the Board of Education, and requested approval of their plan. Siegel responded in a letter dated February 27, 1976, to which he attached the decision of the Board. The decision advised the students that the survey could not be conducted stating, "Freedom of the press must be affirmed; however no inquiry should invade the rights of other persons." The decision indicated that the type of survey proposed could be conducted only by professional researchers, with the consent of the students' parents. The decision noted that "[m]atters dealing with sexuality could have serious consequences for the well being of the individual," and pointed out that the students lacked the requisite expertise to conduct such a survey and that the survey proposed made no provision for parental consent and did not guarantee the anonymity of those who answered.

Mr. Siegel responded to a request for reconsideration by indicating that the Board believed that many students would be harmed if confronted with the questions propounded by the questionnaire.

Plaintiffs commenced this action on August 26, 1976, seeking declaratory and injunctive relief under 42 U.S.C. § 1983, on the ground that the defendants' actions in prohibiting the dissemination of the questionnaire and publication of its results violated the First Amendment.

At a hearing on plaintiffs' motion for a preliminary injunction on September 23, 1976, the court decided to con-

solidate the motion with trial on the merits. See Fed. R. Civ. P. 65(a)(2). Thereafter, the parties agreed that the court should decide the issues on the basis of affidavits. Accordingly, the district court's decision was based upon the briefs, and affidavits of the parties and their expert witnesses.

Judge Motley found that permission to distribute the questionnaire could be denied consistently with the First Amendment only if defendants could prove that "there is a strong possibility the distribution of the questionnaire would result in significant psychological harm to members of Stuyvesant High School." She found that the "thrust" of defendants' evidence was that many high school students were only beginning to develop sexual identities and that the questionnaire would force emotionally immature individuals to confront difficult issues prematurely and become "quite apprehensive or even unstable as a result of answering this questionnaire." The court found this argument convincing with respect to thirteen and fourteen year old students; however, as to older students, the court found the claims of potential emotional damage unconvincing and concluded that the psychological and educational benefits to be gained from distribution of the questionnaire to this group of students outweighed any potential harm. Accordingly, the court held that defendants could not prohibit the students from distributing the questionnaire to eleventh and twelfth-grade students and from publishing the results in the "Voice." The court also found that certain safeguards should guide distribution of the questionnaire and ordered that the students and school officials should negotiate a plan to implement distribution and to provide for "both confidential and public discussion groups for students who would like to talk with school personnel after the distribution of the survey and publication of the results in the *Voice*."

On appeal both parties agree that the defendants' restraint of the students' efforts to collect and disseminate information and ideas involves rights protected by the First Amendment. See *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); cf. *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972). Essentially, resolution of the issues here turns upon a narrow question: What was it necessary for the defendants to prove to justify the prohibition of the distribution of the questionnaire and did the defendants meet this burden of proof?

Our inquiry must begin with *Tinker*, where the Supreme Court stated,

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . , if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

393 U.S. at 512-13 (citations and footnotes omitted).

Essentially, the defendants' position is that the students here seek not only to communicate an idea but to utilize school facilities to solicit a response that will invade the rights of other students by subjecting them to psychological pressures which may engender significant emotional harm.[2] Plaintiffs do not question defendants' authority to protect the physical and psychological well being of students while they are on school grounds, see, e.g., *Ginsberg* v. *New York*, 390 U.S. 629, 640-41 (1968); *Prince* v. *Massachusetts*, 321 U.S. 158, 165 (1944); *Kampmeier* v. *Nyquist*, No. 76-7383, slip op. 2953 (2d Cir. April 15, 1977); rather, they contend that defendants have not made a sufficient showing to justify infringement of the students' rights to speech and expression.[3]

---

2 Plaintiffs' desire to use Stuyvesant students as research subjects distinguishes this case from such cases as *Shanley* v. *Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972) and *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975), which held that school officials could not restrain the distribution of school newspapers containing information about birth control. The questionnaire does not seek to convey information but to obtain it in a manner that school officials contend may result in psychological damage. The fact that some students may read the proposed cover letter and decide not to answer the questionnaire does not diminish the legitimate concern of school officials for those students who decide to answer it.

Further, we cannot ignore the fact that plaintiffs intend to present a report on "Sexuality in Stuyvesant," which will attempt to interpret the results of the questionnaire and make conclusions based thereon. We think the school officials may legitimately be concerned that the proposed article will attempt to make "scientific" conclusions about the sexual habits of Stuyvesant students that may be misleading.

3 Plaintiffs do not challenge the procedure by which the Board's decision was reached and this case does not involve any administrative regulation placing a per se ban on all student surveys. Compare *Eisner* v. *Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971). It is clear that defendants have not tried to suppress all forms of student expression on sex-related matters. Indeed, the curriculum at Stuyvesant includes both formal courses on sex education and peer-group discussion sessions. See discussion, infra. Further, the record shows that defendants would not have attempted to prevent distribution of the questionnaire off school grounds. In addition, this entire controversy has been reported in an article in the school newspaper, which included one of the questions in the questionnaire. See Record, affidavit of Sanford Gelernter, exhibit K. Thus, this case involves restriction of only one among many methods of communication between students on sex-related matters, which, the Supreme Court has noted, "is not without significance to First Amendment analysis, since laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." *Linmark Associates, Inc.* v. *Township of Willingboro*, 45 U.S.L.W. 4441, 4443 (U.S. May 2, 1977).

In interpreting the standard laid down in *Tinker*, this court has held that in order to justify restraints on secondary school publications, which are to be distributed within the confines of school property, school officials must bear the burden of demonstrating "a reasonable basis for interference with student speech, and . . . courts will not rest content with officials bare allegation that such a basis existed." *Eisner* v. *Stamford Board of Education*, 440 F.2d 803, 810 (2d Cir. 1971).[4] At the same time, it is clear that school authorities need not wait for a potential harm to occur before taking protective action. See *Tinker* v. *Des Moines Independent Community School District*, supra, 393 U.S. at 514; *Russo* v. *Central School District No. 1, Towns of Rush*, 469 F.2d 623, 632 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); *Quarterman* v. *Byrd*, 453 F.2d 54, 58-59 (4th Cir. 1971). Although this case involves a

---

4 Similarly, in *Katz* v. *McAulay*, 438 F.2d 1038 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972), we upheld the denial of a preliminary injunction against high school officials' refusal to allow the distribution of leaflets soliciting funds for a political cause on public school grounds noting that, "The Board's regulation appears to be reasonable and proper and has a rational relationship to the orderly operation of the school system." *Id.* at 1061. See *Tinker* v. *Des Moines Independent Community School District*, supra, 393 U.S. at 513. *Nitzberg* v. *Parks*, 525 F.2d 378, 382-83 (4th Cir. 1975); *Butts* v. *Dallas Independent School District*, 436 F.2d 728, 732 (5th Cir. 1971); *Scoville* v. *Board of Education, Joliet Township*, 425 F.2d 10, 13-15 (7th Cir.), cert. denied, 400 U.S. 826 (1970). See also, *Presidents Council, District 25* v. *Community School Board No. 25*, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972).

situation where the potential disruption is psychological rather than physical, *Tinker* and its progeny hold that the burden is on the school officials to demonstrate that there was reasonable cause to believe that distribution of the questionnaire would have caused significant psychological harm to some of the Stuyvesant students.[5]

In support of their argument that students confronted with the questionnaire could suffer serious emotional harm, defendants submitted affidavits from four experts in the fields of psychology and psychiatry. Florence Halpern, professor of psychology at the New York University School of Medicine, stated that many adolescents are anxious about the "whole area of sex" and that attempts to answer the questionnaire by such students "would be very likely" to create anxiety and feelings of self-doubt; further, she stated that there were almost certainly some students with a "brittle" sexual adjustment and that for "such adolescents, the questionnaire might well be the force that pushes them into a panic state or even a psychosis." She concluded that distribution of the questionnaire was a "potentially dangerous" act that was "likely to result in serious injury to at least some of the students."

Dr. Aaron H. Esman, chief psychiatrist at the Jewish Board of Guardians (an organization providing mental health treatment to emotionally disturbed children) and an associate in psychiatry at the Columbia University College of Physicians and Surgeons, indicated that a number of the questions (particularly those dealing with homosexuality, masturbation, and "sexual experience") were

5 Although *Tinker* provides that "undifferentiated fear or apprehension" of a disturbance is not sufficient cause to justify interference with students' freedom of speech, 393 U.S. at 508, school authorities need only demonstrate that the basis of their belief in a potential disruption is reasonable and not based upon speculation. See *Eisner* v. *Stamford Board of Education*, supra, 440 F.2d at 810; note 4, supra.

"highly inappropriate," particularly for children ages twelve through fourteen; such questions, in Dr. Esman's opinion, were "likely to arouse considerable anxiety and tension," which "might well lead to serious emotional difficulties."

Vera S. Paster, a psychologist and assistant director of the Bureau of Child Guidance (the mental health agency for the New York City school system) asserted that there were a "large number" of high school students who would need help dealing with the anxiety reactions caused by confronting the questionnaire and that the proposed methodology of the survey would make it impossible to provide "back up support or protection" for such students.

Dr. Ingram Cohen, chief school psychiatrist of the Bureau of Child Guidance, indicated that there are wide discrepancies in the physical and psychological development of adolescent students, even among students of the same age. Dr. Cohen also pointed out that the survey made no provision for assistance to students who reacted adversely to it and concluded that it had a sufficient potential for harm to justify prohibiting its dissemination.

The record shows that the curriculum at Stuyvesant includes various courses on sex and sexuality and that professionally supervised peer-group discussions are sponsored by the school. The defendants have consistently treated the topic of sexuality as an important part of students' lives, which requires special treatment because of its sensitive nature. Thus, the school system has provided several courses on the physical and emotional aspects of sex; such courses are taught by teachers with special qualifications and administrative materials emphasize the sensitive nature of the topic.[6] Further, the Board has

6 For example, the Board of Education has promulgated "Guidelines for Implementation of Family Living/Sex Education Programs." The guide-

consistently taken the position that even professional researchers may not conduct "sexual surveys" of students without meeting certain specific requirements.[7]

Plaintiffs offered statements from five experts, including Gilbert Trachtman, who is a professor of educational psychology at New York University. Plaintiffs' experts questioned the possibility that any emotional harm could be caused by students' attempts to answer the questionnaire, pointed out that the survey might be of substantial benefit to many students, and expressed the opinion that "squelching" the survey could have deleterious effects. They indicated that the topics covered in the questionnaire are of normal interest to adolescents and are common subjects of conversation; further, some of these experts emphasized that students in Manhattan are bombarded with sexually explicit materials and that it was highly unlikely that any student could be harmed by answering the questionnaire. It is noteworthy, however, that at least two of plaintiffs' experts, one of whom was Gilbert Trachtman, recognized that there was some possibility that some students would

lines provide that teachers desiring to teach such courses must have special training and "all teachers must possess sensitivities about adolescents and sex, their parents, the value system of families, and have a sense of propriety in their classroom behavior."

7 Thus, the Board guidelines, see note 6, supra, which were promulgated in May, 1974, provide, "Teachers, college students, agencies shall neither administer nor participate in surveys eliciting responses about personal sexual behavior from students. Such sex-behavior inventories, as all other health-related surveys, must receive approval from the Board of Education through its Coordinating Council on School Health."

The Board has also promulgated a handbook for research applicants, which provides for certain requirements and safeguards before research involving student subjects may be conducted. The district court rejected the argument that the survey could not go forward because it did not comply with the handbook, which the court found did not apply to student projects, and this issue has not been raised on appeal. However, defendants point out that the handbook and other administrative regulations demonstrate the Board's concern in protecting the well being of students.

suffer emotional damage as a result of answering the questionnaire.[8]

The district court evidently found that there was a "strong possibility" that distribution of the questionnaire would result in significant psychological harm to ninth and tenth-grade students at Stuyvesant. The court did not find that there was no possibility of harm to eleventh and twelfth-grade students; rather, it concluded that any harm was outweighed by psychological and educational benefits to be gained from the questionnaire's distribution. This observation is substantiated by the fact that the court ordered the parties to provide for "confidential and public discussion groups" for students who wished to talk with school personnel after the survey; apparently, this was in response to defendants' contention that the survey as proposed failed to make any provision for counseling students who were disturbed by the questionnaire.

In determining the constitutionality of restrictions on student expression such as are involved here, it is not the function of the courts to reevaluate the wisdom of the actions of state officials charged with protecting the health and welfare of public school students. The inquiry of the district court should have been limited to determining whether defendants had demonstrated a substantial basis for their conclusion that distribution of the questionnaire would result in significant harm to some Stuyvesant students. In this regard, we must keep in mind the repeated emphasis of the Supreme Court that,

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education

8 See affidavits of Gilbert Trachtman and Harry B. Gilbert. See also affidavit of Max Siegel.

in our Nation is committed to the control of state and local authorities.

Goss v. *Lopez*, 419 U.S. 565, 578 (1975), quoting *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). See *Ingraham* v. *Wright*, 45 U.S.L.W. 4364, 4372 (U.S. April 19, 1977); *Tinker* v. *Des Moines Independent Community School District*, supra, 393 U.S. at 507; *Buck* v. *Board of Education of the City of New York*, No. 75-7583, slip op. 3059, 3070-71 (2d Cir. April 20, 1977).

We believe that the school authorities did not act unreasonably in deciding that the proposed questionnaire should not be distributed because of the probability that it would result in psychological harm to some students. The district court found this to be so with respect to ninth and tenth-grade students. We see no reason why the conclusion of the defendants that this was also true of eleventh and twelfth-grade students was not within their competence. Although psychological diagnoses of the type involved here are by their nature difficult of precision, cf. *Cruz* v. *Ward*, No. 77-7043, slip op. 4397, 4405 (2d Cir. June 23, 1977), we do not think defendants' inability to predict with certainty that a certain number of students in all grades would be harmed should mean that defendants are without power to protect students against a foreseen harm. We believe that the school authorities are sufficiently experienced and knowledgeable concerning these matters, which have been entrusted to them by the community; a federal court ought not impose its own views in such matters where there is a rational basis for the decisions and actions of the school authorities. See *Eisner* v. *Stamford Board of Education*, supra, 440 F.2d 810; *Butts* v. *Dallas Independent School District*, 436 F.2d 728, 732 (5th Cir. 1971). Their action here is not so much a curtailment of any First Amendment rights; it is principally a measure to protect the students

committed to their care, who are compelled by law to attend the school, from peer contacts and pressures which may result in emotional disturbance to some of those students whose responses are sought. The First Amendment right to express one's views does not include the right to importune others to respond to questions when there is reason to believe that such importuning may result in harmful consequences.[9] Consequently where school authorities have reason to believe that harmful consequences might result to students, while they are on the school premises, from solicitation of answers to questions, then prohibition of such solicitation is not a violation of any constitutional rights of those who seek to solicit.

In sum, we conclude that the record established a substantial basis for defendants' belief that distribution of the questionnaire would result in significant emotional harm to a number of students throughout the Stuyvesant population. Accordingly, the judgment is reversed insofar as it restrains defendants from prohibiting distribution of the questionnaire to eleventh and twelfth-grade students at Stuyvesant and the case is remanded with instructions to dismiss the complaint.

---

9 We find no merit in plaintiffs' argument that defendants' concern is for only a minority of students and amounts to a "heckler's veto." See *Eisner* v. *Stamford Board of Education*, supra, 440 F.2d at 809 n.6. The issue here is not to what extent school authorities are obligated to protect the dissemination of unpopular views. There is a clear distinction between the speaker's right not to be shouted down and the listener's right to be protected against the importunities of those who seek answers to questions.

Further, we cannot ignore that the district court not only restrained defendants from prohibiting the survey but ordered them to take steps to oversee the distribution of the questionnaire and provide counseling for those students who were disturbed by it; in effect, defendants were told to expend time and money to provide "safeguards" for a survey they insisted could not be made safe. The student's right to speech and expression simply does not extend so far.

GURFEIN, *Circuit Judge,* concurring:

In view of Judge Mansfield's dissent, I would simply add to Judge Lumbard's persuasive opinion the following comments.

First, while the passing out of the several questionnaires might not provoke a breach of the peace, a blow to the psyche may do more permanent damage than a blow to the chin. "Invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 513 (1969).

Second, whether such a traumatic effect can be foreseen is the subject of dispute among recognized psychiatrists, as Judge Mansfield notes. I think such dispute is better resolved by professional educators than by federal judges even when they find the credentials of plaintiffs' experts "more impressive." This is not a case where there is no evidence to support the school officials.

Lastly, this is not a case involving "distribution of sexual material in school." It is, as Judge Lumbard states, a case that involves individual responses to various aspects of sex from the point of view of personal history, a matter different from the simple dissemination of reading matter dealing with sex, which the majority opinion does not purport to ban. *See* footnote 2. That deserves further emphasis in response to the dissenting opinion, lest the majority decision serve as an unintended precedent in derogation of First Amendment right.

MANSFIELD, *Circuit Judge* (dissenting):

With due respect I must dissent for the reason that in my view the defendants have completely failed to sustain their burden of showing that they are justified in depriving plaintiffs of their First Amendment right to engage in constitutionally protected freedom of expression by distributing to students the questionnaire regarding sex attitudes.

There is no suggestion of any danger that the questionnaire would disrupt school activities or lead to a breach of the peace, which are the type of "substantive evils" that might justify a prior restraint, *see Schenck* v. *United States,* 249 U.S. 47, 52 (1919). Instead the majority, relying upon dicta in *Tinker* v. *Des Moines School District,* 393 U.S. 503, 508, 513 (1969), to the effect that school authorities may prohibit speech "that intrudes upon . . . the rights of other students," or "involves . . . an invasion of the rights of others" would include in these amorphous terms the dissemination to others of non-disruptive, non-defamatory and non-obscene material because it might cause some kind of "psychological" harm to an undefined number of students. With this I disagree. It represents an entirely too vague and nebulous extension of the concept of "rights" to support the drastic type of censorship and prior restraint sought by the defendants.

As we said in *Eisner* v. *Stamford Board of Education,* 440 F.2d 803, 808 (2d Cir. 1971), "The phrase 'invasion of the rights of others' is not a model of clarity or preciseness." The *Tinker* test makes sense as a standard designed to insure that school officials will be permitted, even at the expense of some freedom of expression, to maintain order on the school premises, particularly in the classroom, and it has been construed by ourselves and other circuits as permitting an abridgement of free speech toward that

end. *See Eisner* v. *Stamford Board of Education, supra; Katz* v. *McAulay,* 438 F.2d 1058 (2d Cir. 1971) *cert. denied,* 405 U.S. 933 (1972); *James* v. *Board of Education,* 461 F.2d 566 (2d Cir.), *cert. denied,* 409 U.S. 1042 (1972); *Quarterman* v. *Byrd,* 453 F.2d 54 (4th Cir. 1971); *Nitzberg* v. *Parks,* 525 F.2d 378 (4th Cir. 1975); *Burnside* v. *Byars,* 363 F.2d 744 (5th Cir. 1968); *Butts* v. *Dallas Independent School Dist.,* 436 F.2d 728 (5th Cir. 1971); *Scoville* v. *Board of Education,* 425 F.2d 10 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970). Where physical disruption or violence is threatened, some inroads on free expression are tolerable because the interests of students and school officials are relatively specific and lend themselves to concrete evaluation. But a general undifferentiated fear of emotional disturbance on the part of some student readers strikes me as too nebulous and as posing too dangerous a potential for unjustifiable destruction of constitutionally protected free speech rights to support a prior restraint. A public school's premises are the very "marketplace of ideas" where personal intercommunication between students, in or out of the classroom, is "an important part of the educational process" even though some students may experience a degree of mental trauma in that process, *Tinker* v. *Des Moines School Dist.,* 393 U.S. at 512. If school officials are permitted to ban a questionnaire of the type here at issue because of possible "psychological" harm, they could prohibit the dissemination of a broad range of other articles on school premises on the same theory, even though the publications were readily available elsewhere and the information in them was instructive. Within the last few years, for instance, the New York Times, which represents that it publishes "All the News That's Fit to Print," has published numerous articles on the very matters that are the subject of plaintiffs' questionnaire, including items regarding the number of pregnant

girls in public schools, the operation by New York City of a separate school for pregnant schoolgirls attended by up to 2,000 students annually, sexual activity among American teenagers, and the results of a nationwide study of adolescent sexuality.[1] Under the majority's decision, distribution of these items among students would be prohibited as posing a psychological danger to some. The possibilities for harmful censorship under the guise of "protecting" the rights of students against emotional strain are sufficiently numerous to be frightening.

Even accepting arguendo the majority's thesis to the effect that other students' rights include the right to be free of any emotional stress, defendants have failed to sustain their burden of showing that the First Amendment values in the present case are outweighed by the risk of psychological harm. The right of a newspaper to conduct a survey on a controversial topic and to publish the results represents the very quintessence of activity protected by the First Amendment. In a school environment, moreover, there is a positive value in the students' exercise of responsibilities associated with the publication of a newspaper, which gives them a greater appreciation for the true meaning and value of the Bill of Rights than they might otherwise possess.

The majority's holding that the values inherent in these basic rights are outweighed by the potential psychological harm which the questionnaire might cause to some students is based on conclusory and speculative opinions of a few psychologists, which are expressed in short affidavits, hypothetical rather than supported by any factual bases, untested by cross-examination, and flatly controverted by

---

1 A few recent New York Times articles or editorials pertaining to the subject are summarized in its index:

E.g., New York Times, March 21, 1976 at p. 29, Col. 1; *id.*, Oct. 16, 1976, at p. 27, col. 2; *id.*, June 28, 1974, at p. 17, col. 4.

contrary affidavit opinions of other experts who possess equal if not superior qualifications as psychologists. All of the affidavits submitted by defendants, moreover, assume that a student possessed of fragile sensibilities would not only read the questionnaire but make an intensive effort to answer it, notwithstanding the statement on its face that "The survey is random and completely confidential.—You are not required to answer any of the questions and if you feel particularly uncomfortable—don't push yourself."[2] Some of the defendants' affidavits appear to be concerned principally with an issue not before the court—the methodology used by the questionnaire and its invalidity from a scientific statistical viewpoint,—rather than its psychological impact on students.

The conclusory and factually unsupported nature of the affidavit opinions relied on by the majority may be gathered from a brief summary of their contents. A 1½ page affidavit of Ingram Cohen, Chief School Psychiatrist of the Bureau of Child Guidance of the defendant Board of Education, offers his view that "a" student "may become anxious or even depressed" when he is asked for a judgment about himself and has doubts concerning sexual orientation, and that the "administration" of the questionnaire to immature high school youths, "still in the throes of resolving personal identity," would be sufficiently "provocative" to be "potentially harmful and arouse concern." The two page affidavit of Vera S. Paster, Assistant Director of the same Bureau, states that dissemination of the questionnaire "constitutes a potentially harmful exposure to some students" because, in attempting to answer it they would experience an "up-churning of anxiety, conflict, self-

2 I would have no objection to our conditioning distribution of the questionnaire upon the same or similar language being printed in bold type and given an even more prominent position either on the face of the letter covering the questionnaire or on the questionnaire itself.

doubt and other symptoms of stress" arising out of "conflicts about their own sexuality issues." Defendant's official in charge of evaluating research, Dr. Anthony J. Polemeni, who "was asked to apply professionally accepted research standards to [the] proposed research study," states that it does not meet such standards because it "presented significant possibility of violating the privacy of students and having harmful consequences to . . . students." In reviewing the questionnaire at issue, his standard was that "one does not undertake a non-critical survey which may, even remotely, create psychological trauma for even one person." In my view this is error. The standard should not be the effect of the questionnaire upon one or even a few exceptionally immature and impressionable students but its effect on the average. *Cf., Roth* v. *United States,* 354 U.S. 476, 489 (1957); *Butler* v. *Michigan,* 352 U.S. 380, 383-84 (1957).

Defendant also presented two affidavits from persons outside its own staff. One is Aaron H. Esman, Chief Psychiatrist at the Jewish Board of Guardians, which provides mental health services to emotionally disturbed children, a Director of Psychiatric Training at Madeleine Borg Child Guidance Institute, and Associate in Psychiatry at Columbia. He states that the survey may arouse "considerable anxiety and tension in a significant number of students" because of "bald" questions about sex. He concludes that while "it might be possible to devise a valid study of the sexual beliefs and attitudes . . . [It] is my view that this survey is poorly designed, unlikely to yield valid, verifiable or useful information and is potentially dangerous to the group for whom it was intended." Finally, Florence Halpern, a Clinical Professor at New York University School of Medicine and a former project director at HEW in charge of developing mental health guidelines

for certain programs, states that "emotional and psychological harm is likely to occur and the chance of this happening is far greater than the possibility that no children will be injured." She continues: "Reading the questionnaire and thinking of answers to many of the queries would be very likely to stir up questions, doubts, fantasies and anxiety, resulting in impaired school performance because of sexual preoccupation, sleeplessness, heightened feelings of self-doubt, depression, and in some instances, even more disturbing reactions." For some students, she concludes, "the questionnaire might well be the force that pushes them into a panic state or even a psychosis."

The foregoing affidavits are flatly controverted by five eminently well-qualified experts who have worked extensively in the field of school psychology. Dr. Adam Munz, Chief Psychologist at St. Luke's Hospital, Assistant Professor of Clinical Psychiatry at Columbia University, Consultant to the Columbia University Health Services (where he actively works with students) and to the Cathedral School of St. John the Divine, swears in part:

> "I have had the opportunity to peruse the material presented in connection with the "Sexuality in Stuyvesant" questionnaire, including the questionnaire itself and the various affidavits submitted by all concerned with said questionnaire.
>
> I would like to state, by way of a summary of my opinion in this matter, that in the more than 25 years of active experience as a clinical psychologist I have *never* encountered a situation in which a child, adolescent or adult has been adversely affected by a questionnaire! —the statement that "in some cases confrontation of this sort might lead to serious emotional difficulties" is totally unfounded and speculative.

> The realities of life, the rawness of the world around us to which these youngsters are exposed daily on their way to and from school, are undoubtedly far more eroding of their development than a questionnaire could ever be." (Appendix, p. 148)

A detailed nine-page affidavit was furnished by plaintiff Gilbert M. Trachtman, professor of educational psychology, director of a school psychology program and of the NYU children's consultation service, president of the School Psychology Educators Council of New York State, past-president of the Nassau County Psychological Association and of the School Division of New York Psychological Association and a consultant to numerous public and private schools. He swore in part:

> "3. I have objectively reviewed the questionnaire proposed for the article on "Sexuality in Stuyvesant". I emphasize that it is not only relevant and germane to the interests and concerns of the students in the 13-18 year age range, but can affirm from personal and professional experience that every question listed [in the questionnaire] touches upon topics frequently occurring in day to day conversations among students in this age group and no question could be unexpected, arcane or upsetting to students who associate in any manner with their peers, whose discussions will perforce include adversions to sexual issues.
>
> 4. The administration of Stuyvesant High School has, in the past, offered rap groups on sexuality to its students and encouraged participation in these open-ended, face to face verbal discussions. While these groups may have been led by trained teachers, they nevertheless exposed students to a degree of peer pressure and verbal confrontation far in excess of any

impact created by a voluntary and anonymous written questionnaire. This statement in no way constitutes a criticism of peer rap groups, which are to be applauded, but is meant to place in proper perspective the mild impact of the projected questionnaire, which is considerably less invasive of personal privacy and much less likely to arouse anxiety.

5. For those youngsters who have already discussed sexual matters freely with peers, the questionnaire will have little or no impact. Those youngsters who have not participated freely in such discussion are quite likely to be reserved, shy or already anxious about sexual matters and therefore unwilling to share information and attitudes with peers. Such youngsters are likely to be less informed, to have less access to current relevant peer group norms and attitudes and to be anxious about themselves on the basis of misinformation, distortion or fantasy. For such youngsters the questionnaire may serve as an outlet for private communication, and a reassurance that others are concerned about similar matters, and the projected article based on this questionnaire may well serve a valuable educational purpose in reducing fantasy and distortion and relieving anxiety.

6. Youngsters of this age, living and travelling in an urban environment are constantly bombarded by sexually-laden stimuli. The media—advertising, newspaper reports, TV drama, film, theatre—are constantly dealing with homosexuality, unisexuality, bisexuality, premarital sex and all of the other topics covered in this questionnaire. Walking to and from school, youngsters meet prostitutes, are handed advertisements for massage parlors, and witness homosexual courtships. The defendants seem to assert that some of the ques-

tions in this questionnaire may arouse undue anxiety in some youngsters who are less well defended or whose personality adjustment is somewhat precarious. I would suggest that any youngster sufficiently fragile to suffer serious anxiety or depression upon reading questions which (s)he may ignore with impunity or respond to anonymously, is a youngster too fragile to have survived the trip from home to school. There is absolutely no evidence that the impact of this questionnaire will even remotely approximate the impact of all the sexually laden environmental stimuli already imposed upon these youngsters. . . .

9. The environment in the context in which the questionnaire at issue will be used, is an urban (New York City) high school in 1976. A school, as noted, situated in a city which bombards its inhabitants with sexual stimuli. Sexual stimuli, which include all topics covered in the proposed survey and extending quite beyond it. Indeed, recent research, "Adolescent Sexuality in Contemporary America", Sorensen, R. C., 1973, N.Y.: World Publishing Co., indicates that sexual behavior is on the upswing among adolescents and that young people are increasingly explicit about sex.

The proposed survey is not only projected within this environmental context but, in turn, is an additional component within the environment. It is pertinent, therefore, to note the relevant characteristics of the questionnaire, and the manner of distribution of the proposed survey:

(1) It is voluntary; (2) it requires a written (and therefore private) communication, rather than a verbal (and public) communication; (3) it is anonymous; (4) a proposed cover letter outlines all of the above and further encourages the volunteer respon-

dents to ignore any specific questions which make them uncomfortable." (Appendix, pp. 93-95, 96-97).

Harry B. Gilbert, Professor of Education at Fordham and Coordinator of the Urban School Psychology Program, was from 1955 to 1966 in charge of the examination for licensing of all school psychiatrists, psychologists, and guidance personnel for defendant, and prior to that served as supervisor of psychologists at defendant's Bureau of Child Guidance. He stated, among other things:

"I see the survey project and questionnaire here at issue as a classic example of adolescents reaching out for information and relief of concern in an area of great developmental moment to them. Adolescents are most interested in their newly developed sexual abilities and their inability to achieve expression of their interests and desires. Quite appropriately, there are legitimate reasons why sexual expression is difficult to achieve for young adolescents. But society makes the problem even more difficult by its failure to explore the extent of sexual knowledge, attitudes, practices and concerns among teenagers and to make provision for the sharing of such findings among teenagers in order to allow alleviation of anxiety that is prevalent. . . .

5. The danger that some students might be exposed to anxiety arousal exists. But it is so minute compared with the enormous benefit to be derived from students learning that their concerns are common and developmentally normal. Moreover, this would provide opportunity for genuine information to be shared and not leave sexual information to be gained solely from furtive peer whisperings or pornographic literature which does abound.

6. An effect of squelching this student proposal can only serve to drive sexual feelings further underground and to provide adolescents with a cause to do battle with authority figures who treat students as children, not budding adults. (Appendix, pp. 102, 103)

Professor Max Siegel (A104), President of the Division of Clinical Psychology of the American Psychological Association, past-president of the New York State Psychological Association and program head of the Graduate Program of School Psychology at Brooklyn College, states in part:

"Given that the questionnaire is voluntary and anonymous so that a student may choose not to participate without embarrassment [sic] or concern for peer pressure, there seems to be no basis for any expectation of emotional harm to individual students.

Indeed, I would conclude that the questionnaire and the resultant article may prove a valuable service and fill an important need for the students of Stuyvesant High School, providing them as it does with normative and demographic information which can play a valuable role in providing reality based contexts for discussion in areas of sexuality. Most adolescents discuss sexual issues frequently, and those who do not enter such discussions frequently are nevertheless quite likely to obsess and ruminate privately about these same issues, but with less facts and less information about their fellow students, and with consequent possibilities of more fantasy and more distortion, and, as a consequence, irrational anxiety. It is much more likely that collection and dissemination of relevant facts and attitudes from peers will prove to

be constructive and useful than in any way harmful." (Appendix, pp. 105-106)

Victor B. Elkin (A107), Director of the National Institute of Mental Health Project—Psychology in the schools, and for 20 years director of psychological services for the Long Beach City School District, swears:

"As a result of my 25 years of direct service to public school children, I have become sensitive and aware of the need to appropriately respect and effectively relate to the children in our schools. Not only do I not find this questionnaire objectionable or dangerous, but actually I find it to have positive mental health implications. In today's day and age, with sexuality ramptantly [sic] used in advertising, entertainment, in literature, the questions presented in this questionnaire are actually benign.

4. For many young boys or girls of high school age, such a questionnaire could serve as a positive impetus for facing and coming to grips with many issues regarding their own personal thoughts and feelings about themselves, within a sexual context. Very much like the cliche, that it is healthier for the child to learn about sexuality from a parent rather than "in the street," it is although healthier for a child to learn about or become in touch with his or her own thoughts and feelings, and even anxieties from a questionnaire which might stimulate thinking, rather than from headlines and various magazines, newspapers, or the screaming announcements of theater marquees." (Appendix, pp. 108, 109)

If the issue before us were to be decided on the credentials and independence of the experts offered by both sides,

plaintiffs would probably have the edge. Without denigrating the standing of defendants' experts, the credentials and experience of plaintiffs' experts are more impressive. Moreover, four of the five experts offered by the plaintiffs (Munz, Gilbert, Siegel and Berger) are independent, whereas a majority of the defendants' psychologists (Cohen, Paster, and Polemeni) are employed by the defendants. More important, however, is the failure of the defendants, who have the burden, to provide any factual foundation for the conclusions voiced by them and their experts. In this day and age, when children in New York City are literally bombarded with explicit sex materials on public newsstands on the way to and from school, when they are encouraged openly and frankly to discuss sex topics and problems in "rap sessions" sponsored by their schools (which, unlike the questionnaire at issue are face-to-face and not anonymous), when the children actually do discuss sex with their peers at school, when the number of teenage pregnancies in New York City's public high schools such as Stuyvesant is so high that the City has operated a special high school for pregnant high school girls attended by up to 2,000 pregnant teenagers annually, when adolescent sexuality is openly discussed in New York newspapers, I believe the defendants have failed completely to demonstrate any reasonable likelihood that the questionnaire poses any substantial harm to any appreciable number of high school students.

The picture drawn by the defendants of high school freshmen and sophomores (to say nothing of juniors and seniors) as fragile, budding egos flushed with the delicate rose of sexual naivety, is so unreal and out of touch with contemporary facts of life as to lead one to wonder whether there has been a communications breakdown between them and the next generation. Yet the defendants' sponsorship

of "rap sessions" among students to discuss these very matters indicates not only an awareness of the high school student's knowledge and insight into sex matters but a strange inconsistency with the defendants' attitude toward the questionnaire. If face-to-face, non-anonymous discussions between students of the very matters that are the subject of the questionnaire causes no psychological harm to those involved, I cannot believe that an anonymous questionnaire, which states right on its face that the recipient need not answer it but is free to throw it away, would do so. I can only conclude that the defendants are more concerned about the structure and methodology of the questionnaire than about its alleged psychological impact.

Other courts, when faced with substantially the same problem, have not hesitated to find that distribution of sexual material in school to students is protected by the First Amendment and that school authorities failed to sustain their heavy burden of demonstrating that prohibition of such distribution was reasonably necessary to guard against harm to the students' rights. *See, e.g., Shanley* v. *Northeast Independent School Dist.*, 462 F.2d 960 (5th Cir. 1972) (school newspaper article discussing birth control). Indeed, in *Bayer* v. *Kinzler*, 383 F. Supp. 1164 (E.D.N.Y.), *aff'd*, 515 F.2d 504 (2d Cir. 1974), we affirmed a district court decision finding that the distribution of a sex information supplement to a school newspaper was constitutionally protected. I fail to find any significant legal distinction between these holdings and the present case.

I do agree with the majority that Judge Motley's Solomonic judgment, which would cut the baby in half by permitting distribution of the questionnaire to juniors and seniors while denying it to freshmen and sophomores, cannot stand, in view of the failure of the record to reveal any substantial evidentiary basis for the distinction other

than the surmise that the younger students would be more vulnerable to possible psychological trauma than the older ones. However, for the reasons stated, the defendants have failed to sustain their burden as to either group.

Accordingly I would affirm the district court's holding that the questionnaire may be distributed to juniors and seniors, reverse its holding that the questionnaire may not be distributed to freshmen and sophomores and direct the court to retain jurisdiction for the purpose of resolving any dispute that might arise with respect to distribution of any resulting school newspaper article that might be written.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of August, one thousand nine hundred and seventy-seven.

Present: HON. J. EDWARD LUMBARD

HON. WALTER R. MANSFIELD

HON. MURRAY I. GURFEIN

Circuit Judges,

Jeff Trachtman, individually and by his father, Gilbert M. Trachtman, Plaintiffs-Appellees-Appellants, -v- Irving Anker, individually and in his capacity as Chancellor of New York City Public Schools, Sanford Gelernter, individually and as Administrator of Student Affairs, Office of Student Affairs, Office of High Schools, Board of Education of the City of New York, Gaspar Fabricante, individually and as Principal of Stuyvesant High School & James Regan, Isaiah Robinson, Stephan Aiello, Amelia Ashe, Joseph Barkan & Robert Christen, constituting	77-7011 77-7033

The Board of Education of the City of New York, Defendants-Appellants-Appellees

Appeal from the United States District Court for the southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed with instructions to dismiss the complaint in accordance with the opinion of this court with costs to be taxed against the plaintiffs-appellants.

A. Daniel Fusaro,
Clerk

By Arthur Heller
Deputy Clerk

At a Stated Term of the United States Court House, in the City of New York, on the twenty-seventh day of October, one thousand nine hundred and seventy-seven.

Present: HON. J. EDWARD LUMBARD,

HON. WALTER R. MANSFIELD,

HON. MURRAY I. GURFEIN,

Circuit Judges.

Jeff Trachtman, Individually and by his father, Gilbert M. Trachtman, Plaintiffs-Appellants-Appellees, v. Irving Anker, individually and in his capacity as Chancellor of New York City Public Schools, Sanford Gelernter, individually and as Administrator of Student Affairs, Office of High Schools, Board of Education of the City of New York, Gaspar Fabricante, individually and as Principal of Stuyvesant High School & James Regan, et al., Defendants-Appellees-Appellants.	77-7011 77-7033

A petition for a rehearing having been filed herein by counsel for the plaintiffs-appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEFF TRACHTMAN, Individually and by his father, GILBERT M. TRACHTMAN,	x	
Plaintiffs,	x	76 CIV. 3845
-against-	x	
IRVING ANKER, Individually and in his capacity as Chancellor of New York City Public Schools, et al.,	x	
Defendants.	x	

APPEARANCES

BERGER, KRAMER &
SUGERMAN
By: Martin M. Berger
377 Broadway
New York, New York
10013

Attorney for Plaintiffs

W. BERNARD RICHLAND
Corporation Counsel
City of New York
By: Robert Deutsch
Asst. Corp. Counsel
Municipal Building
New York, New York
10007

Attorneys for Defendants

CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION

Plaintiffs are a student at Stuyvesant High School (Stuyvesant) in New York City and his father. Student plaintiff Jeff Trachtman, in his capacity as editor-in-chief of the school newspaper, the Voice, sought permission from the defendant principal at Stuyvesant and the New York City Board of Education (the Board) to distribute a questionnaire designed to measure the sexual attitudes of his fellow Stuyvesant students. Permission was denied.

Plaintiff now sues for an injunction which would 1) prevent defendants from prohibiting the distribution of the questionnaire throughout the school and 2) prevent defendants from prohibiting publication of an interpretation of the responses to the questionnaire in the Voice. 1/

The question is whether defendants deprived the student plaintiff of his First Amendment right to freedom of expression when they refused him permission to distribute his questionnaire.2/ The court holds that defendants violated the First Amendment rights of the plaintiff student when they refused permission to distribute the questionnaire to upper class students. The court further holds that defendants cannot refuse permission to publish the results in the school newspaper.

The questionnaire (which is attached hereto as an appendix) is composed of twenty five questions requiring rather personal and frank information about the student's sexual attitudes, preferences, knowledge and experience. Plaintiff seeks to distribute the questionnaire on a random basis. He would then tabulate and interpret the responses for publication in the school newspaper. The identities of those who answer the questionnaire are to be kept strictly confidential. The questionnaire includes a proposed cover letter which describes the nature of the inquiry. It also suggests to the student that if he or she finds the questionnaire disturbing, it should not be answered.

In denying plaintiff permission to distribute the questionnaire, the Board acknowledged the constitutional rights of the students, but stated that student research, especially that which deals with a subject as sensitive as a student's sexual attitudes, must comply with the strict standards contained in a handbook entitled, "Cooperative Procedures Governing Research Proposals--Handbook for Research Applicants." In short, the contention of the Board is that since the questionnaire did not meet these standards and since only professional researchers could handle such a subject with the proper sensitivity, the student request to conduct this study must be denied. It also claimed that some students would suffer irreparable psychological damage upon being confronted with the questionnaire and the necessity to answer certain of the questions.

Plaintiff denies that the study, as planned, could result in harm to some students. He claims that the handbook applies to outside researchers, not expressive activities conducted by the students themselves.

The basic principles governing First Amendment rights of high school students were enunciated by the Supreme Court in. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). There the Court said: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. Continuing, the Court noted that it had "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." 393 U.S. at 507. It also ruled that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 393 U.S. at 508. Before abridging the First Amendment rights of students, the school authorities must show that restrictions on the expressive activity are "necessary to avoid material and substantial interference with schoolwork or discipline. . ." 393 U.S. at 511. The burden of proving that such restrictions are necessary is on the school authorities.

Katz v. McAulay, 438 F. 2d 1058 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972).

Although students do not shed their constitutional rights upon entering school, Tinker and subsequent cases make it clear that these rights must be balanced against the duty of the school authorities to maintain discipline and to provide an atmosphere which is conducive to learning. First Amendment rights must be applied in the context within which they are asserted, Healy v. James, 408 U.S. 169, 180 (1972), and these rights are not necessarily co-extensive with those of adults. Baughman v. Freienmuth, 478 F. 2d 1345, 1351 (4th Cir. 1973); Shanley v. Northeast Ind. School Dist., 462 F. 2d 960, 969 (5th Cir. 1972).

The principles enunciated above have been formulated mainly in the context of student publications and political activities and their potential disruptive effects. The question in this case, however, is markedly different: To what extent will the distribution of a questionnaire dealing with sexual attitudes infringe on the rights of the students and their parents, and what is the potential for psychological harm as a result of the distribution? Tinker did not deal with this specific question but focused on the "physically" disruptive effects of students wearing black armbands in opposition to the Viet Nam War. However, Tinker did not delineate the circumstances under which the school authorities may proscribe students' First Amendment rights. If defendants can prove there is a strong

possibility the distribution of the questionnaire would result in significant psychological harm to members of Stuyvesant High School, then the distribution could be denied. See Shanley v. Northeast Ind. School Dist., 462 F. 2d 960, 971 (5th Cir. 1972) (the standard is the "reasonableness" of the restrictions).

At least two cases have dealt with the problem of whether high school students could distribute material dealing with sexual issues. The distribution was allowed in both instances. Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F. 2d 504 (1975); Burford v. Board of Education of the Baldwin Public Schools, et al., Index No. 8482/72 (Sup. Ct. Nassau Co., decided August 16, 1972). This court does not, however, consider either of these cases to have precedential value. Neither dealt with the issue whether a student questionnaire, eliciting very personal and frank information, could have detrimental effects on high school students.

The thrust of defendants' evidence is that serious harm could result if certain students are confronted with particular questions in the survey. It is argued that many high school students are only beginning to develop sexual preferences and that their "identities" are in a state of rapid development. To be asked such pointed questions at this stage in their lives would force those students who are emotionally immature to confront difficult issues prematurely. The result, defendants claim, is that certain students may become quite

apprehensive or even unstable as a result of answering this questionnaire. The court finds that this reasoning applies only to students as young as 13 and 14 years of age. Defendants, therefore, did not violate the Constitution in prohibiting distribution at this level.

The court does not have the luxury of simply granting or denying the relief requested by plaintiff. When students' First Amendment rights are asserted, the reasonable restrictions which are imposed must be the minimum necessary to protect the need for discipline and to protect the interests of the students. Grayned v. City of Rockford, 408 U.S. 104, 116-117 (1972). The relief must be carefully tailored in light of the circumstances of each individual case.

> "Free speech under the First Amendment, though available to juveniles and high school students as well as adults, is not absolute [,] and the extent of its application may properly take into consideration the age or maturity of those to whom it is addressed." Quarterman v. Byrd, 453 F. 2d 54, 57 (4th Cir. 1971).

The court finds defendants' analysis of possible harm to be unconvincing with respect to the junior and senior students. In fact, it appears that such a questionnaire would have substantial beneficial effects. It cannot be denied that New York City high school students are today confronted with an avalanche of explicit

sexual information and misinformation. Many a newstand in the midtown area is the functional equivalent of a pornographic shop. Stuyvesant High School is located on the lower east side of Manhattan. Courses in sex education are taught in the school. Information about sex--both correct and incorrect--is imparted daily on television, on radio and via the rash of new sex magazines about town. With a wry blend of hyperbole and truth, one of plaintiff's affiants asserts that "any youngster sufficiently fragile to suffer serious anxiety or depression upon reading questions which (s)he may ignore with impunity or respond to anonymously, is a youngster too fragile to have survived the trip from home to school." It seems to the court that the distribution of this questionnaire, which is soberly and responsibly written, is an acceptable way in which to have students present sexual issues to other students--free from the debasement of commercialism and sensationalism--and guided by interested parents.

Defendants are concerned that harm will result if the students are directly confronted with their own attitudes towards sexual issues (and they certainly will be so confronted if they answer this questionnaire). But it seems that the result of answering this survey is more likely to produce exactly the opposite effect. Upper class students who are sexually immature or who have certain conflicts would be more likely to resolve these problems if they are faced, as a result of peer pressure,

with the basic questions, and if they are simultaneously made aware of the fact that many other students have similar problems. The distribution of the questionnaire and the publication of the results in the Voice will make it clear that the questions asked are the concerns of many, and that the problems which a student may face are not unique to himself.[3]

In addition to this court's finding that, with respect to the older students, the psychological benefits of the survey far outweigh any harm, there are also significant educational benefits to be gained from this student project. Many of defendants' affiants objected to the unscientific nature of the survey claiming that the questions are a hodge-podge and that the results would prove nothing. This argument is beside the point. The value to the scientific community is not relevant. What is important here is that a number of students took the initiative to research and design a survey with the help of adults. This type of independent investigation should be encouraged and applauded, for an integral goal of our educational system is to stimulate inquiry as well as to impart knowledge. The Second Circuit has stated:

> "A public school is undoubtedly a 'marketplace of ideas.' Early involvement in social comment and debate is a good method for future generations of adults to learn intelligent involvement." Eisner v. Stamford Board of

Education, 425 F. 2d 10, 14 (1970), cert. denied, 400 U.S. 826 (1970).

This court rejects defendants' argument that, since the study does not conform with the published research handbook of the Board, the student study may be restrained. First, these guidelines, by their own terms, apply only to certain "qualified agencies" and to "candidates for graduate degrees." They were not designed to apply to students. They can not now be brought out of the file and used as a rationale to deny students the opportunity to conduct their own research. Second, while defendants can ban the distribution of literature without relying on an existing "rule", Eisner v. Stamford Board of Education, 440 F. 2d 803, 808 n.4 (2d Cir. 1971), any such rule must be strictly tailored to protect the constitutional rights of the students. Eisner, supra. Unquestionably, the Board can strictly control the in-school research activities of outsiders. Ellis v. Dixon, 349 U.S. 458 (1955); cf. Katz v. McAulay, 438 F. 2d 1058 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972). But the Board's guidelines are deficient in at least two respects when applied to students. The court sees no reason why students who seek to exercise First Amendment rights need be burdened by the requirement that any survey or research that they carry out conform to certain standards and must employ the proper research methodology. Such a standard would frustrate even the brightest

and most curious of students. These students would be limited to designing a proper type of study after endless hours of consultation with someone who is skilled in the complicated area of scientific research.

Another requirement which would impose an undue burden on this type of student expression is the requirement of parental consent before a student is allowed to answer the questionnaire. This requirement would seriously complicate--and perhaps frustrate--the research project of the student plaintiff. Consent forms would have to be distributed, returned and tabulated; curious students may be tempted to forge "stubborn" parents' signatures; the paperwork could lamentably reach adult proportions. The court recognizes that parents have an interest in knowing--and sometimes controlling--what their children learn in school. The court has a responsibility to weigh these concerns when deciding whether certain expressive activities of high school students should be protected when objections are raised by school authorities. The court has not forgotten the interests of the children's parents. However, in view of the arguments already noted and the fact that this research project--though dealing with a very sensitive topic--was designed and written in a highly responsible manner; and in view of the fact that the distribution of the questionnaire must be accomplished in accord with the safeguards

described below, this court holds that parental consent is not required under the circumstances of this case before a child in the upper grades can answer plaintiff's survey.

Defendants suggest that the students are free to distribute the questionnaire off of the school grounds. This alternative is not acceptable to the students because it would defeat their attempt to collect a random sample of responses. Distribution and subsequent collection may become too disorganized to achieve any useful results. The court's objection to this alternative is that the various safeguards--which defendants understandably insist are necessary--would be impossible to apply in such a situation. (See infra, pp. 16-17). Cf. Healy v. James, 408 U.S. 169, 183 (1972).

While the distribution of the survey to students in the 11th and 12th grades should be allowed, the court is not persuaded that younger children will not grow anxious when answering some of the questions on the survey. It also appears that some of these children, who are as young as 13 and 14 years, may be too young and immature to be exposed to a comparison of their sexual attitudes and experience with that of their peers. In view of the numerous affidavits of defendants, we cannot confidently conclude--as we did in the case of the older students--that the distribution of this survey will not result in some significant harm to the youngest children at Stuyvesant. The school authorities certainly need not wait until the harm has

occurred before restricting First Amendment rights; they can take reasonable precautions to prevent the possibility of harm. Butts v. Dallas Ind. School Dist., 436 F. 2d 728, 731 (5th Cir. 1971). The Board, therefore, may continue to deny plaintiffs permission to distribute the questionnaire to the 9th and 10th grade students.

The distribution of the survey should be allowed in grades 11 and 12, but certain safeguards requested by the school authorities should definitely guide this distribution. The court feels that the details of the distribution should be worked out through negotiations of the interested parties. The court is quite unfamiliar with the special needs and structure of Stuyvesant. And the courts, as a general rule, should minimize their involvement in the day to day business of our schools. Healy v. James, 408 U.S. 169, 195 (1972) (Chief Justice Burger concurring); Shanley v. Northeast Ind. School District, 462 F. 2d 960, 967 (5th Cir. 1972).

The inexpertise of the court is only one reason why it should limit its involvement in Stuyvesant's business. The students and the school authorities should be encouraged to come to mutual agreements free of the outside pressure of the legal system. There should be no losers or winners when students and school officials disagree for, presumably, all concerned are interested in promoting the common goal of educating our children. The relationship should not become adversarial. It should be one of

accommodation and understanding. See, e.g., Goss v. Lopez, 419 U.S. 565, 593-4 (1975) (Mr. Justice Powell dissenting).

The parties should, therefore, agree on a plan by which to distribute, collect and publish the survey in light of the following elements:

1. The negotiators shall be chosen by the respective parties and shall include a student representative, a parent representative chosen by the students, the principal (or his representative) of Stuyvesant, and a representative of the Board of Education (who may delegate his authority to the principal).

2. The negotiators shall select a member of the Stuyvesant faculty or administration--acceptable to the students--who will take the responsibility for seeing that the distribution, collection and publication of the survey are performed in accordance with the final plan.

3. Provision should be made for both confidential and public discussion groups for students who would like to talk with school personnel after the distribution of the survey and the publication of the results in the Voice.

4. A written description of this plan (if a plan is agreed upon) shall be submitted to the court on or before December 30, 1976.

5. A hearing on the proposed plan will be held on January 5, 1977. It is to be attended by those who negotiated this agreement as well as the parties' counsel. If no agreement has previously been reached, the court will draw its own plan. If an acceptable plan has previously been submitted, this hearing may be cancelled.

Dated: New York, New York
December 15, 1976

S/CONSTANCE BAKER MOTLEY
CONSTANCE BAKER MOTLEY
U.S.D.J.

FOOTNOTES

1. A hearing on plaintiff's motion for a preliminary injunction was commenced on September 23, 1976. At that time the court decided to consolidate the motion for preliminary injunction with the trial on the merits. Rule 65(a)(2), Fed. R. Civ. P. Thereafter, a trial was scheduled to hear evidence on the question whether distribution of the questionnaire could result in psychological harm to some of the students. The parties later agreed that the court should decide the possible harm question on the basis of affidavits submitted by both sides. The court has now considered those affidavits and the evidence adduced on the hearing of the motion for preliminary injunction and now makes its findings of fact and conclusions of law as required by Rule 52, Fed. R. Civ. P.

   At this same hearing, the defendants waived their claim for damages of $1000 as to each defendant.

2. The complaint also asked that defendants be enjoined from "employing an unconstitutional system of prior review of literature...." This point was neither argued nor briefed and the court, therefore, does not reach this issue.

FOOTNOTES, cont'd

3. It is noteworthy that Stuyvesant is a school for intellectually gifted students, who are more likely to respond to the questionnaire with a higher degree of maturity than other students.

The Stuyvesant Voice

"SEXUALITY IN STUYVESANT"
Robert Marks

Mr. Fabbricante, Principal.

Mr. Pearlman, Faculty Advisor

Dear Participant,

The following is a survey for an article being written for the Stuyvesant Voice. The topic is "Sexuality in Stuyvesant". In this case, "sexuality" covers a wide area from human equality to sexual education.

Sexuality plays a very important role in society--far more important than many people realize. It affects every human encounter, every interplay and its effect is no weaker in Stuyvesant than anywhere else. With the help of this survey, I will attempt to draw some conclusions and interpretations concerning the influence of sexuality on the Stuyvesant community.

The questions asked are direct and personal. The survey is random and completely confidential. Noone will know who has filled out your specific survey except you. Because of the strict precautions that are being taken to make all answers confidential, I am hoping that you will be as honest, open and responsible as possible when answering the questions.

You are not required to answer any of the questions and if you feel particularly uncomfortable-don't push yourself. Any additional information that you feel is pertinent is more than welcome and extra space is provided for these comments.

The article itself, is a personal study of attitudes and ideas. It will contain some statistics, but only enough to demonstrate similarities and differences among the surveyed Stuyvesantians. But, to a greater extent, it will be a human article expressing human feelings on an underplayed and extremely important part of our lives.

Please consider your answers carefully. This survey comprises the bulk of the research for the article. Honesty and responsibility cannot be stressed enough.

Your cooperation is greatly appreciated. Thank you.

Sincerely yours,

S /Robert A. Marks
Robert A. Marks

EXHIBIT "A"

STUYVESANT VOICE

1. Sex: 2. Grade:

3. What is your definition of sexuality?

4. Is the atmosphere different (in respect to sexuality) at Stuyvesant as opposed to your old school? Drastically___ Little_____ Not at all_____

Did you have trouble adjusting?
Greatly_____ Somewhat_____ Not at all_____

Comments?

5) Does sexual profanity offend you?
Yes_____ No_____

Comments?

6) What are your attitudes towards the traditional dating situation? eg. Only boy can ask girl out? Boy pays for date?

7) Are men equal to women? Totally_____
In most cases_____ Never_____

Comments?

8) To what degree should unisexuality be carried? (It has been haircuts and clothing up to now, it could one day be bathrooms. How do you feel?)

9) Do sexual stereotypes exist? If yes, which do you feel most strongly about?

10) Do you feel the institution of marriage is outdated? Greatly_____
Somewhat_____ Not at all_____

Can you think of any alternatives?

11) Do you approve of pre-marital sexual relations?
Greatly disapprove_____ Some reservations_____ Approve_____

Comments?

12) Do you approve of contraception?
Greatly disapprove_____ Some reservations_____ Approve_____

Comments?

13) What types of contraception are you aware of? What types would you use?

14) How would you react to homosexuality if it occurred among your peers? Extremely uncomfortable_____ Uncomfortable_____ Slightly Uncomfortable_____ Comfortable_____

Comments?

15) Do you consider yourself a hetero-sexual_____, homosexual_____ or a bisexual_____?

Comments?

16) What are your feelings on homosexuality? Bisexuality?

17) Would you object to a homosexual or a bisexual in a position of authority? Greatly_____ Somewhat_____ Not at all_____

Comments?

18) What are your feelings on the topic of masturbation? Can it hurt the body? the mind?

19) What are feelings on abortion? Would you conceivably have one yourself?

20) What is the extent of your sexual experience? Was this experience (whatever it may be) what you expected it to be?

21) Do you feel an emotional relationship must coexist with a sexual one? (or vis versa) Yes_____ No_____

Comments?

22) Where did most of your sexual education take place?
In my home_____ In school_____ Among my peers_____ Other_____

Comments?

23) Do you feel your views on sexuality coincide with those of your parents? Do you get along with your parents? In what ways do their opinions agree or differ from yours?

24) Do you feel that your sexual education (emotional and factual) is complete? Are there or have there been deficiencies? Is it the school's job to correct this deficiency? Are you satisfied with the situation?

25) Do you feel a change to more liberal attitudes in respect to the topics discussed in this questionnaire, on the part of the society, would be good or bad? Why?

Comments on other areas not mentioned in this questionnaire would be greatly appreciated. You may also expand on any of the questions that were included. Finally, please include some feedback on the questionnaire itself.
Thank you for your cooperation.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1054

JEFF TRACHTMAN, individually and by his father GILBERT M. TRACHTMAN,

Petitioners,

-against-

IRVING ANKER, individually and in his capacity as Chancellor of New York City Public Schools, SANFORD GELERNTER, individually and as Administrator of Student Affairs, Office of High Schools, Board of Education of the City of New York, GASPAR FABRICANTE, individually and as Principal of Stuyvesant High School, and JAMES REGAN, ISAIAH ROBINSON, STEPHAN AIELLO, AMELIA ASHE, JOSEPH BARKAN and ROBERT CHRISTEN, constituting the Board of Education of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
The City of New York,
Attorney for Respondents.
Municipal Building,
New York, New York 10007
(212) 566-4426 or 4337

LEONARD KOERNER,
CAROLYN E. DEMAREST,
of Counsel.

INDEX

Cases Cited

Cases Cited

Constitution, Statutes and Rules

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1054

JEFF TRACHTMAN, individually and by his father GILBERT M. TRACHTMAN,

Petitioners,

-against-

IRVING ANKER, individually and in his capacity as Chancellor of New York City Public Schools, SANFORD GELERNTER, individually and as Administrator of Student Affairs, Office of High Schools, Board of Education of the City of New York, GASPAR FABRICANTE, individually and as Principal of Stuyvesant High School, and JAMES REGAN, ISAIAH ROBINSON, STEPHAN AIELLO, AMELIA ASHE, JOSEPH BARKAN and ROBERT CHRISTEN, constituting the Board of Education of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

Questions Presented

1. Is this matter a live case or controversy so as to confer jurisdiction under Article III of the United States Constitution?

2. Was the decision below correct under the unique circumstances of this case?

Statement of the Case

Sometime in 1975, petitioner* and a fellow student at Stuyvesant High School prepared the sex survey questionnaire which is appended to the petition for certiorari at pages 56a-59a and submitted it to the principal of the school for approval.** Principal Fabricante did not give his approval and the survey was submitted to the Office of Student Affairs. Based upon respondents' policy requiring parental consent for student participation in research projects, Student Affairs Administrator Gelernter denied

---

*Although the caption indicates plural petitioners, as used herein, "petitioner" refers only to the student Jeff Trachtman.

**The survey was originally intended to consist of an oral interview, but was changed to a written questionnaire in the course of the administrative appeal.

permission to distribute the questionnaire by letter dated December 17, 1975. Petitioner appealed his decision to higher administrative authorities and obtained a final denial of permission by resolution of the Board of Education on February 24, 1976. The instant litigation was commenced by service of a summons and complaint on August 26, 1976, alleging a violation of petitioner's First Amendment rights pursuant to 42 U.S.C. §1983.

The merits of the case were determined by the District Court for the Southern District of New York (MOTLEY, J.), upon the affidavits of experts in the fields of psychology and psychiatry submitted on behalf of both sides. The substance of these affidavits, and additional relevant facts, are adequately set forth in the opinion of Judge LUMBARD

and will not be repeated (2a-15a).*

Judge MOTLEY found that the risk of psychological harm to children of thirteen and fourteen years of age was sufficiently substantial to justify prohibiting the distribution of the questionnaire to this group, but that the petitioner's First Amendment rights were violated by prohibiting distribution to upper class students (38). Judge MOTLEY directed the parties to devise a suitable plan for distributing the questionnaire in such a way so as to conform to the "safeguards requested by the school authorities" (49a-50a).

Both sides appealed portions of the decision of the District Court. The appeal to the Second Circuit Court of Appeals was

*Numbers in parentheses refer to pages of the Petition For Certiorari unless otherwise noted.

argued March 31, 1977 and decided August 31, 1977. In the interim, petitioner graduated from Stuyvesant High School and is no longer a student in the New York City Public School System. In a footnote, the Circuit Court indicated that it did not believe petitioner's graduation rendered the case moot, finding that the litigation had been brought by petitioner acting in a representational capacity (2a-3a).

Citing to its own application of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), in the case of Eisner v. Stamford Board of Education, 440 F. 2d 803, 810 (2d Cir., 1971), the Circuit Court ruled: "[I]n order to justify restraints on secondary school publications, which are to be distributed within the confines of school

property, school officials must bear the burden of demonstrating 'a reasonable basis for interference with student speech'" (9a). In evaluating the evidence presented at the trial level, the Court stated: "The inquiry of the district court should have been limited to determining whether defendants had demonstrated a substantial basis for their conclusion that distribution of the questionnaire would result in significant harm to some Stuyvesant students" (13a). The Circuit Court concluded that the evidence of significant harm was sufficient, not only as to ninth and tenth-grade students, as the District Court had found, but also with respect to eleventh and twelfth-grade students (14a). Noting that the prohibition against distribution of the questionnaire was not intended to curtail the petitioner's First Amendment

rights, but "is principally a measure to protect the students committed to their care, who are compelled by law to attend the school, from peer contacts and pressures which may result in emotional disturbance to some of those students whose responses are sought," the Court held (15a):

> "The First Amendment right to express one's views does not include the right to importune others to respond to questions when there is reason to believe that such importuning may result in harmful consequences."

Judge GURFEIN, concurring in Judge LUMBARD's majority opinion, emphasized that the decision of the Circuit Court was premised on the fact that the case at bar does not involve "distribution of sexual material in school", which is protected by the First Amendment, but, rather "involves individual responses to various aspects of

sex from the point of view of personal history" (16a). Judge GURFEIN also applied a rule set forth in Tinker v. Des Moines School District, supra, 393 U.S. 503, 513 (16a):

> "'Invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech'."

Judge MANSFIELD dissented, finding that respondents had not met their burden of demonstrating a reasonable basis for their decision which, in Judge MANSFIELD's opinion, did abridge petitioner's First Amendment rights (17a). Judge MANSFIELD's conclusions were based upon his evaluation of the expert opinion offered on each side. He found the affidavit opinions relied upon by the majority to be "conclusory and factually unsupported" (20a), and "flatly controverted by five eminently well-qualified experts" (22a), including petitioner's father, whose

credentials Judge MANSFIELD found superior to those of respondents' experts (29a).

POINT I

THE COURT DOES NOT HAVE JURISDICTION TO DECIDE THIS CASE BECAUSE IT HAS BEEN RENDERED MOOT BY PETITIONER'S GRADUATION.

In Board of School Commissioners of Indianapolis v. Jacobs, 420 U.S. 128 (1975), a case factually analogous to that at bar, this Court declined to review the merits of the lower courts' debisions, finding that the graduation of the six named plaintiffs rendered the case moot. Like petitioner herein, the Indianapolis plaintiffs were high school students and members of their school newspaper who had challenged the school board's rules and regulations as violative of their First Amendment rights. Although the Indianapolis complaint stated that the litigation

was intended to be brought as a class action, the District Court had never so certified. This Court ruled that the failure to identify and obtain certification of an appropriate class in conformity with the procedural requirements of F.R.C.P. 23 was fatal to jurisdiction of a viable case or controversy. Respondents submit that this Court's ruling in Board of School Commissioners of Indianapolis v. Jacobs is determinative of the instant petition.

The Circuit Court's footnote dicta indicating that that Court believed the case not to be moot because petitioner was acting "in a representational capacity as editor-in-chief of 'the Stuyvesant Voice'" (3a) is not legally accurate. While the complaint states that the student Jeff Trachtman was at that time editor-in-chief of "The Stuyvesant Voice" (Appendix, p. 31),

class status was neither sought nor obtained. Moreover, no student who wished to respond to such questionnaire was made a party. Since plaintiff did not affirm his own intention to respond to the questionnaire, he cannot be said to represent the class of intended distributees or student respondents. Warth v. Seldin, 422 U.S. 490, 499 (1975); Richardson v. Ramirez, 418 U.S. 24, 39 (1974). The only right plaintiff ever had standing to assert was that First Amendment right personal to himself as a student and member of the school newspaper to publish his own perceptions and ideas. As he is no longer in either position, he cannot benefit from the outcome of this appeal, and the case is moot.

The cases cited in the opinion of the Court below in support of its finding against mootness are all distinguishable from this

case. In Richardson v. Ramirez, supra, 418 U.S. 24, 39, plaintiffs had been accorded class status pursuant to California rules of procedure which, the Court noted, would probably not have been granted if the action had originated in the federal system, but which the Court found to be controlling in that case. The controversy involved the constitutionality of a California statute which had been applied to permanently disenfranchise convicted felons who had served their sentences and parole. Although the original three respondent county clerks had agreed, while the litigation was pending, to alter their policies, a fourth county clerk had been added as a party defendant and had not joined in the agreement to change the suspect policy. Thus, there was clearly present a live case and controversy between the identified adverse

parties in Richardson.

Similarly, in Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976), although the individually named plaintiff could no longer benefit from a favorable decision due to changed circumstances, his suit had been certified as a class action. This Court found that certification of a class conferred legal status upon the unnamed members of the class which kept the controversy alive and prevented mootness. That case is not applicable to the case at bar since petitioner was never certified to represent a class.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), is completely inapposite to the instant case. Unlike Trachtman, who is an individual asserting First Amendment rights personal

to himself, the Washington State Advertising Commission was a state agency, comparable to a trade association, elected by apple farmers of that state to promote and protect the commercial interests of its constituency. The issue was not mootness, but standing to bring the suit alleging that North Carolina's regulation of apple grades on containers shipped into that state imposed an unconstitutional burden on interstate commerce. This Court found that the plaintiff agency met the requirements already established in Warth v. Seldin, supra, 422 U.S. 490 for representational standing as a trade association. Of particular interest in that case was the consideration given to the requirement that, in a representational suit, neither the claim, nor the relief should require the participation of the individuals

represented (432 U.S. at 343). Such a requirement could certainly not be met in the case at bar since all aspects of the relief requested, i.e., the distribution of the questionnaire, the compilation of the responses, and the writing of the proposed newspaper article, would necessarily have to be performed by individual members of the alleged "class", which no longer includes the plaintiff.

In DeFunis v. Odegaard, 416 U.S. 312 (1974), this Court found that the fact that a resolution of the issues presented on appeal would not affect the plaintiff student who would be permitted to complete his final term of law studies and receive a diploma regardless of the outcome of the appeal, deprived the Court of jurisdiction to consider

the merits of the case pursuant to Article III of the Constitution. This Court held: "It matters not that these circumstances partially stem from a policy decision on the part of the respondent Law School authorities" (416 U.S. at 317).

It is possible, if not probable, that an issue similar in some respects to that bar may arise again in the future. However, given the truly unique character of the proposed questionnaire, and the context in which it is proposed to be presented, it is unlikely that all of the elements of this controversy will again combine in exactly the same manner so that the instant case could be found to be sufficiently "capable of repetition" to overcome the jurisdictional defect created by mootness.

See SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972); Williams v. Alioto, 549 F. 2d 136, 142 (9th Cir., 1977). Moreover, it is apparent from the sequence of events herein that, had this matter been diligently litigated from the start, it would have been possible to bring this matter before this tribunal before it became moot. The issue is not, therefore, evasive of review.

POINT II

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS CORRECT AND APPROPRIATE IN THE UNIQUE CIRCUMSTANCES OF THIS CASE.

This Court very recently acknowledged that "laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977). See Tinker v. Des Moines School District, supra, 393 U.S. 503, 513. It has been further recognized that First Amendment rights must be evaluated on a case by case basis, giving full consideration to such facts as the age and maturity of those to whom the proposed communication is addressed. Healy v. James, 408 U.S. 169, 180 (1972); Quarterman v. Byrd, 453 F. 2d 54, 57

(4th Cir., 1971). The facts of this case clearly support the decision of the Second Circuit Court of Appeals that the time, place and manner of the proposed "speech" justified prohibiting the distribution of the questionnaire, and that the First Amendment was not violated.

It is undisputed that Stuyvesant High School provides extensive instruction in matters of sex and, in addition, provides students with a forum within the school curriculum where they can discuss such matters freely among their peers.* It is clear,

*Petitioner's "less restrictive means" argument (12-13) could, in fact, easily be turned around in favor of respondents. Not only were means less destructive of the student psyche already available at Stuyvesant, i.e., the student rap sessions, from which petitioner might have gleaned the information for his story, but, such sessions presented petitioner with a forum for his own thoughts and ideas among students who had already

(Footnote cont'd. on next page)

therefore, that it was not the substance of the proposed message which was sought to be regulated or suppressed by respondents. Cf., Linmark Associates, Inc. v. Township of Willingboro, supra, 431 U.S. at 94. This fact distinguishes the case at bar from Tinker v. Des Moines School District, supra, and the other cases cited by petitioner (6).

Contrary to petitioner's assertions (8-10), it was not the message petitioner

---

* (Footnote cont'd. from previous page)

voluntarily expressed an interest in the subject-matter by attending the sessions. In addition, petitioner had the alternative of restructuring his questionnaire to provide the safeguards required by school authorities. Surely, the respondents do not have the obligation of reviewing proposals like that submitted by the petitioner with undefined and infinite possibilities for modification in mind. It is doubtful that permission conditioned upon specified modifications would have been acceptable to petitioner in any event, notwithstanding Judge Motley's directions.

sought to convey which was found to be emotionally or psychologically hazardous to students at Stuyvesant, but petitioner's solicitation of the most intimate thoughts and experiences of his fellow students with the intent to compare them publicly with those of other students that caused respondents to suppress the questionnaire. Regardless of the alleged "voluntary" nature of the questionnaire, the vulnerability of the average adolescent to peer pressure is well known and it is extremely unlikely that the recipient of such a questionnaire could decline to respond without being exposed to ridicule and possible emotional trauma. It was, therefore, not the message, but the manner in which it was to be presented that prompted respondents to deny permission to distribute the questionnaire.

Petitioner's statement that the majority opinions below "suggest that a report of the information obtained by the survey could also be prohibited" (7) is not supported by the facts. Both Judge LUMBARD and Judge GURFEIN limited their findings to the distribution of the survey and carefully distinguished the dissemination of information aspect of the case (3a; 8a, n.2; 13a; 16a).

However, although the publication of an informational article was not prohibited, the representation to the student community that the proposed article was to be based upon "scientific" research did play a significant part in the decision of the administrative authorities. The Board of Education reasoned that rules applicable to scientific research in the public schools generally should govern the type of survey proposed by petitioner (Appendix, p. 60). It was

petitioner's failure to provide professional research controls and obtain the informed consent of both students and parents that precipitated the conflict. The value and accuracy of any sociological analysis necessarily depends upon the reliability of the research techniques employed. It was feared that the ad hoc research technique proposed by petitioner would result in highly inaccurate and misleading conclusions which, when presented in the context of a school newspaper article published with the express consent of school officials, would be accepted uncritically by the student readers as truth. Thus, the place in which the proposed communication was to occur was considered to be significant in determining whether petitioner's First Amendment rights were unconstitutionally impaired.

The Court below correctly relied upon Ginsberg v. New York, 390 U.S. 629 (1968) and Prince v. Massachusetts, 321 U.S. 158 (1944) (8a), in finding that the respondents had reasonably performed their duty to protect the children in their charge from unnecessary psychological harm which might result from distribution of the questionnaire. The decision of the Second Circuit is completely consistent with the teachings of Tinker v. Des Moines School District, supra, 393 U.S. 503, 508, in which this Court noted that students other than those wishing to express their own opinions have the right "to be secure and to be let alone." It is this right which respondents sought to protect in prohibiting petitioner's survey.

In weighing the rights of petitioner against those of the student body generally, respondents contend that the correct decision

was made. Respondents submit that the expert opinion presented in support of their decision was more than sufficient to establish the reasonableness of their conclusions. The nearly unanimous opinion of the experts on both sides was that emotional harm to at least some students would probably result from exposure to the questionnaire. It was not determined, nor would it be possible to predict, exactly how many students would be so affected. The opinions of the experts diverged, however, primarily upon the relative value of such traumatic confrontation. Petitioner's witnesses apparently believed that such trauma might be beneficial and would have a cathartic effect upon those who were experiencing emotional difficulty regarding matters of sex. Respondents, relying upon the more moderate advice of

their own experts, determined to proceed more cautiously. Their decision conformed in every respect to the standards laid down by this Court for the proper administration of public schools in a manner that protects the welfare and rights of all without unreasonably restricting the rights of the individual student. Tinker v. Des Moines Independent School District, supra, 393 U.S. 503, 507, 511-513. Cf., Ingraham v. Wright,430 U.S. 651, 681-82 (1977). When a good faith decision is made based upon a rational evaluation of all of the facts, the courts should not intervene in the day to day management of public schools. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). A difference of opinion among experts does not render the professional judgment of school authorities unreasonable or violative of petitioner's constitutional rights.

Finally, petitioner has raised the argument that the procedure required for prior restraint of constitutionally protected materials was not followed (12). The Circuit Court correctly noted in a footnote (8a, n.3):

> "Plaintiffs do not challenge the procedure by which the Board's decision was reached and this case does not involve any administrative regulation placing a per se ban on all student surveys."

The procedural issue was not litigated below and the record does not indicate that approval of the proposed survey was originally sought in compliance with any particular rule established by respondents. The only rules relied upon by respondents are those applicable to researchers, which were not followed by petitioner. The question of the efficiency of respondents' review procedure

is not properly before this Court for review.

CONCLUSION

The petition for certiorari should be denied.

February 22, 1978

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel for
the City of New York,
Attorney for Respondents.

LEONARD KOERNER,
CAROLYN E. DEMAREST,
of Counsel.